United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-243 OF 1991
HARUN HASHIM SCJ, LC VOHRAH AND ANUAR JJ
31 DECEMBER 1992

Banking *— Banker and customer — Forged cheques — Liability of paying bank — Bills of Exchange Act 1949 s 24*

Banking *— Banker and customer — Forged cheques — Duty owed by customer to banker — Bills of Exchange Act 1949 s 24*

Civil Procedure *— Appeal — Findings of fact — Matter for the trial court to determine*

Civil Procedure *— Standard of proof — Forgery — Proof on a balance of probability*

Evidence *— Forged cheques — Handwriting expert evidence — Expert to give reasons for conclusions made*

The respondent was a customer of the appellant bank and had opened an account at the appellant's branch in Kuala Lumpur. The respondent's accounts clerk who was not an authorized signatory to cheques, forged several cheques of the respondent drawn on the appellant bank. All these cheques were honoured by the appellant and the respondent's account with it was debited in consequence. After the forgeries were discovered, the respondent brought an action against the appellant claiming a sum of RM397,660 being the total of the forged cheques which had been met by the appellant. The learned trial judge gave judgment for the respondent and the appellant appealed.

Held, dismissing the appeal:

(1) A customer who alleges that his banker has honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities.

(2) It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion, which is a tort of strict liability. Therefore, at common law, a banker who pays out on such a forged instrument is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it.

(3) At common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as

soon as the customer becomes aware of it. However there does not exist at common law a further duty on the part of the customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

Obiter:

(1) The issue whether a signature on a document has been forged is a question of fact. It is a matter for the trial court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point.

(2) In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is worthless and any reliance upon such evidence would constitute a serious misdirection warranting interference by an appellate tribunal.

[Bahasa Malaysia summary

Penentang adalah seorang pelanggan perayu dan telah membuka satu akaun di cawangan bank perayu di Kuala Lumpur. Kerani akaun penentang yang tidak diberi kuasa untuk menandatangani cek, telah memalsukan beberapa cek penentang ke atas bank perayu. Semua cek itu telah dibayar oleh perayu dan akaun responden telah didebitkan. Selepas pemalsuan itu disedari, penentang telah membawa satu tindakan terhadap perayu menuntut supaya RM397,660 iaitu jumlah cek yang telah dipalsukan yang telah dibayar oleh perayu. Hakim perbicaraan yang arif telah memberi penghakiman memihak kepada penentang dan perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Seseorang pelanggan yang mengatakan bahawa banknya telah melunaskan cek palsu dari akaunnya hanya perlu membuktikan pemalsuan itu atas timbangan kebarangkalian.

(2) Adalah merupakan suatu prinsip yang sudah mantap bahawa tanggungan sebuah bank apabila membayar keluar atas suatu suratcara pelanggan yang dipalsukan diasaskan pada tort konversi, yang adalah tort liabiliti ketat. Oleh itu, dalam common law, seorang juru bank yang membayar keluar atas suratcara yang dipalsukan ini bertanggungjawab memperbetulkan kerugian itu. Beliau tidak boleh mengatakan bahawa beliau tidak sedar tentang pemalsuan itu atau bahawa beliau telah mengambil langkah berjaga-jaga yang munasabah. Suratcara yang dipalsukan itu adalah batal dan seorang jurubank tidak diberi kuasa, sebenarnya atau diimplikasikan, dari pelanggannya untuk bertindak ke atasnya.

(3) Di bawah common law, seseorang pelanggan mempunyai dua kewajipan terhadap banknya. Yang pertama ialah supaya tidak

menulis cek dengan cara yang boleh memudahkan penipuan atau pemalsuan. Yang kedua adalah kewajipan memberitahu bank itu mengenai pemalsuan cek itu sebaik sahaja selepas pelanggan itu mengetahui tentang perkara itu. Sebaliknya tidak ada kewajipan selanjutnya di bawah common law bagi pelanggan itu untuk mengambil langkah beringat-ingat apabila menjalankan perniagaannya supaya mengelak pemalsuan oleh pekerja-pekerjanya. Juga tidak terdapat di bawah common law, jika tidak ada kontrak untuk menyatakan sebaliknya, kewajipan atas pelanggan itu supaya memeriksa penyata akaun yang dikirim kepadanya dari masa ke semasa untuk memastikan bahawa akaunnya diuruskan dengan betul oleh bank itu.

Obiter:

(1) Isu sama ada tandatangan di dalam sesuatu dokumen telah dipalsukan adalah suatu soalan fakta. Ia merupakan perkara yang diputuskan oleh mahkamah perbicaraan selepas menimbangkan kebolehpercayaan saksi yang telah dilihat dan didengar olehnya dan selepas mengambil kira sebarang keterangan pakar atas perkara itu.

(2) Di dalam kes sivil dan lebih-lebih lagi di dalam kes jenayah, keterangan seseorang pakar mengenai tulisan tangan yang tidak disokong oleh data yang meyakinkan yang menunjukkan proses bagaimana beliau membuat keputusannya adalah tidak berharga dan sebarang pergantungan kepada keterangan itu adalah suatu salah arahan yang sirius yang membolehkan suatu mahkamah rayuan mengganggu keputusan itu.]

Notes

For cases on forged cheques honoured by the bank, see 1 *Mallal's Digest* (4th Ed) paras 831–832.

Cases referred to

1 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors* [1985] 3 WLR 317; [1986] AC 80 (folld)
2 *Syarikat Perkapalan Timor v United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 (refd)
3 *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218 (folld)
4 *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 (refd)
5 *Brown v Westminster Bank* [1964] 2 Lloyd's Rep 187 (refd)
6 *Tina Motors Pty Ltd v Australia & New Zealand Banking Group Ltd* [1977] VR 205 (refd)
7 *London Joint Stock Bank Ltd v Macmillan & Arthur* [1918] AC 777 (folld)
8 *Greenwood v Martins Bank Ltd* [1933] AC 51 (folld)
9 *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd & Anor* (1981) 148 CLR 304 (refd)
10 *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 NZLR 7 (refd)

A 11 *Abbu Chettiar v Hyderabab State Bank* [1954] 1 *Madras Law Journal* 566 (refd)
12 *Canadian Pacific Hotels Ltd v Bank of Montreal* (1988) 40 DLR 385 (refd)

B **Legislation referred to**
Bills of Exchange Act 1949 s 24

Appeal from: Civil Suit No C 2128 of 1983 (High Court, Kuala Lumpur)

C *Joginder Singh* (*Sykt Joginder Singh*) for the appellant.
G Sri Ram (*Manjit Singh* with him) (*Sri Ram & Co*) for the respondent.

Anuar J (delivering the grounds of decision of the court): This is an appeal by United Asian Bank Bhd (which, since the lodging of the appeal has
D changed its name to Bank of Commerce Bhd) against the decision of Zakaria Yatim J, given at Kuala Lumpur on 4 June 1991 whereby the learned judge entered judgment against the appellant in the sum of RM1,491,424.34 together with interest on the sum of RM397,660 at the rate of 8%pa from 25 August 1983 until the date of realization. On 13 October 1992 after hearing arguments, we dismissed the appeal with
E costs. We had at the time indicated that we would give written reasons for our decision and we accordingly do so now.

The facts of this case are fairly simple and straightforward. The appellant carries on banking business. It has a branch at Jalan Ipoh, Kuala Lumpur. The respondent was a customer of the appellant having an account at the
F said branch. The respondent's account no 20–090 with the appellant was opened on 25 January 1978 by means of a document entitled 'Account Opening Form'. A directors' circular resolution dated 16 January 1978 accompanied the respondent's application to open the account and in it, any two of the respondent's three directors were nominated as the authorized signatories to operate the account. The form by which the account was
G opened is, by reason of the way in which the case has been argued by the appellant, important and merits full reproduction. It is in these terms:

Account Opening Form

[Limited companies]
H Account No 20–090 25 January 1978
The Manager,
United Asian Bank Bhd
Jalan Ipoh

Sir,

I We request you to open a current deposit account in our name in the books of the bank.

We hand you herewith:

(1) Certificate of incorporation (for inspection and return).
(2) Copy of memorandum and articles of association.

(3) Certificate of the registrar of joint stock companies that the company is entitled to commence business (for inspection and return).
(4) Certified copy of a resolution of the board of directors regulating the conduct of the account, together with specimens of the signature of the authorized signatories (Please see reverse of this form).
or
Power of attorney containing authority to open banking account and to operate thereon together with specimen of signature.

We agree to comply with, and to be bound by, the bank's rules for the time being for the conduct of such accounts.

Kindly furnish us with a passbook and a book of cheque forms.

Title of Account Tai Soon Heng Construction Sdn Bhd
Address No 18 Jalan Suppiah Pillay, Sentul, KL

Yours faithfully,
Sgd Tai Soon Heng Construction Sdn Bhd
Director

(Emphasis added.)

It is pertinent to note that the bank's rules referred to in the form were never produced in evidence. Nor was evidence given as to the existence of such rules.

At all material times, one Wong Chow Seng ('Wong') was the respondent's accounts clerk. Between November 1979 and November 1982, Wong cleverly forged several cheques of the respondent drawn on the appellant bank. All these cheques were honoured by the appellant and the respondent's account with it was debited in consequence. Wong was not an authorized signatory to negotiable instruments, including cheques, drawn by the respondent on the appellant.

In August 1982, the respondent employed a new accounts clerk who, in December of that year, discovered the fraud perpetrated by Wong. Consequently, on 9 December 1982, the respondent's managing director, Yong Kai Meng (PW4 in the court below), lodged a police report (exh P4) complaining of the forgeries that had been discovered as at that date. Further forgeries were later discovered and PW4 lodged another report on 14 April 1983. It transpired that a total of 97 cheques had been forged by the fraudulent Wong, all of which had been honoured by the appellant. Wong was later charged under s 420 of the Penal Code (FMS Cap 45) in respect of 18 cheques. He pleaded guilty and was accordingly convicted and sentenced.

On 5 August 1983, the respondent issued a writ against the appellant claiming a sum of RM397,660 being the total of the 97 forged cheques that had been met by the appellant. In the main, the respondent's case against the appellant, although it included a charge of negligence, was based on the tort of conversion. The appellant raised several defences all of which were rejected by the learned judge who found in the respondent's favour and accordingly entered judgment. The learned judge in rejecting the factual defence found that the impugned cheques had indeed been forged. In rejecting the legal defences, he relied almost entirely on the decision of the

Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors.*[1]

Before us, Mr Joginder Singh, who also appeared as counsel for the appellant in the court below, sought to attack the learned judge's conclusions both on the facts and the sustainability of the legal defences raised by the bank in answer to the respondent's claim. It is therefore necessary to deal with the several issues which appellant's counsel has raised and argued.

In its defence, the appellant specifically denied that the signatures on the impugned cheques had been forged. The respondent therefore set about proving forgery. In support of its case, it called Mr Phan Kok Chai, the document examiner from the Department of Chemistry who gave expert evidence that in his opinion, the 97 cheques did not bear the authorized signature. On some of these cheques, the signatures of both authorized signatories had been forged; in others, one of them had been forged. PW4 also testified on the issue of forgery and denied having signed the relevant cheques. The learned judge in his very careful judgment gave cogent reasons for holding that the cheques were forgeries.

The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing the expert to determine the question. In this case, we are satisfied that the learned trial judge has not fallen into an error of this nature.

Mr Joginder Singh has attacked Mr Phan's evidence on the ground that he did not give reasons for coming to his conclusion that the signatures on each of the 97 cheques had been forged and in support of his submission relied on a passage in the text book *The Identification of Handwriting and the Cross-examination of Experts* by MK Mehta where the learned author states (at p 23 of the text):

> It is common failing in a number of experts that they do not clearly state their reasons on which they base their opinions while submitting the reports to the courts. The result is that the courts as well as the lawyers suffer from a distinct disadvantage. It is extremely difficult for them in such cases to test and verify the correctness of the opinions given. The mere opinion of the expert that a particular writing or signature is written or not written by the writer whose standard admitted writings or signatures were supplied to him for comparison, without any cogent reason, is not enough. The function of the expert is to give his honest opinion and place before the court all the data on which he bases his opinion, because it is the court who has to decide the case and accept or reject his opinion. In the absence of a clear and precise statement of his reasons, it is difficult for the court to appreciate the opinion of the expert. It is also not fair to the opposite side who is to cross-examine the expert on the correctness of his opinion. Any opinion given without stating the reasons is valueless and is of no use as evidence.

We entirely agree with the passage cited. In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting inter-

ference by an appellate tribunal. However, having said that, we are of the opinion that the principle contended for has no application to the facts of this case.

In the first place, the disputed cheques were referred to Mr Phan pursuant to two orders of court dated 23 July 1987 and 28 October 1987 (produced in the court below as exhs P29 and P30) which required him to examine the cheques and say whether the signatures upon them were genuine or not. This he did. Secondly, having examined the record of appeal, we are satisfied that the respondent had in Mr Phan's evidence-in-chief adduced sufficient evidence to support his conclusions. That being the case, it was up to the appellant to challenge the evidence of Mr Phan under cross-examination by attacking the reasons for his conclusions. From the record it is apparent that Mr Phan was subjected to searching and strenuous cross-examination. The learned judge nevertheless accepted his evidence and we are unable to find any misdirection by the learned judge on this point.

Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v United Malayan Banking Corp Bhd*[2] was cited in support. We have examined this decision with some care but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd*[3] where at p 220 the learned judge said:

> In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang alias Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.

We are therefore of the opinion that the learned judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

For the reasons we have given, we are in agreement with the learned judge upon his conclusion on the issue of forgery. There has been no misdirection on his part and we accordingly uphold his findings on the point.

The important point of principle upon which this appeal turns is the liability of a banker to his customer in respect of forged cheques. Mr Joginder Singh has argued that although the cheques were forged, the appellant was nevertheless not liable for the following reasons:

(1) the respondent was under a duty to ensure that its cheques were not forged by its employee and it had acted in breach of this duty on the facts of the case. At the very least, the respondent was guilty of contributory negligence in not supervizing the employee sufficiently, for had it done so, the forgeries would not have occurred or at least would have been detected much earlier; and

(2) the respondent was estopped from claiming that the bank was liable because the bank had sent periodic statements of account which carried a notation to the effect that unless the appellant was notified of any discrepancy within 14 days the balances shown in the statements will be considered correct. Further, the bank had also sent confirmation slips which the respondent had acknowledged as accurately reflecting its bank balance and in the premises, it was not open for the respondent to challenge the debits made against the forged cheques. In any event, these matters constituted an implied term in the contract between the appellant and the respondent.

In making these submissions, Mr Joginder Singh made a frontal attack on the Privy Council decision in *Tai Hing Cotton Mill v Liu Chong Hing Bank Ltd.*[1] In that case, the Privy Council had put paid to the arguments now canvassed before us and also advanced by the appellant in the court below. Counsel submits that we should depart from *Tai Hing*[1] and hold the bank safe from liability. The submissions made in support of the appellant's case are far-reaching and the case has therefore become one of general importance. However, before we deal with *Tai Hing*[1] and determine what exactly it decided, it is necessary for us to examine the principles on which a banker's liability to his customer depends when the former meets forged cheques drawn on the account of the latter.

It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion. That is a tort of strict liability. At common law, the business of a banker was so perilous because of the nature of the tort of conversion that in 1882 it became necessary in England to introduce legislation to safeguard the banking community. The Bills of Exchange Act 1882 of UK finds its parallel in the enactment of the same name in this country passed in 1949. The history of the matter has been well traced in a judgment of Diplock LJ (as he then was) in *Marfani & Co Ltd v Midland Bank Ltd*[4] at p 577 where the following statement of the law appears:

> It may seem odd that in the 1960s [and we may add in the 1990s] the liability of the defendant bank for the part which they were deceived into playing in this transaction should be affected by the series of legal fictions by use of which the lawyers of the sixteenth century evolved from the ancient real action of detinue sur trover a personal action on the case of trover which, with the abolition of forms of action, became the modern tort of conversion. It may also seem odd that the basis of their liability is that the piece of paper on which the cheque was written was 'goods' belonging to the plaintiff company, and that the defendant bank's acts in accepting possession of that piece of paper from Kureshy, in presenting it to the Bank of India and accepting payment of it, constituted an

unjustifiable denial by them of the plaintiff company's title to its goods, from which damage flowed. Such, however, is the common law of England, and one of the consequences of the historic origin of the tort of conversion and its application to negotiable instruments as 'goods' is that the tort at common law is one of strict liability in which the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.

At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.

A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received.

So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by s 82 of the Bills of Exchange Act 1882, then by the Bills of Exchange (Crossed Cheques) Act 1906 and finally by s 4 of the Cheques Act 1957.

Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s 24 of the Bills of Exchange Act 1949 which creates a limited exception in favour of a banker. The section provides:

Subject to the provisions of the Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

The proviso has no application to the facts of the case before us.

Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged

signature is effective and that the instrument is accordingly good for payment. There are several decisions illustrating the circumstances in which a banker is protected but for the purposes of this appeal it is sufficient to refer to just two of these.

In *Brown v Westminster Bank Ltd*,[5] the plaintiff's signature had been forged by a Mrs Carless, her husband and her daughter on some 329 cheques that had been stolen from the plaintiff. One hundred of these cheques had been forged between February 1959 and April 1961. The remainder were forged between April 1961 and October 1961. Evidence was led to show that the bank's branch manager had, in October 1960, drawn the plaintiff's attention to a number of cheques that had been apparently made payable to Mr Carless. At an interview which the branch manager had with the plaintiff, the former was given the impression by the latter that the cheques were genuine. At a second interview, the plaintiff had been specifically asked by the branch manager to check her statements of account. The plaintiff failed in her action to recover the moneys paid out on the forgeries. It was held that there was an estoppel in favour of the bank in that by failing to respond to the inquiries made by the bank's branch manager, the plaintiff by her silence had represented the cheques to be genuine and was therefore precluded from contending otherwise. On the facts of that case, the plaintiff was plainly under a duty to speak and her silence therefore amounted to an estoppel.

In *Tina Motors Pty Ltd v Australia & New Zealand Banking Group Ltd*,[6] the plaintiff's employee had forged a number of cheques drawn on the plaintiff's account with the defendant. The bank paid the cheques and then debited the plaintiff's account. On two occasions, the bank had doubted the signatures on cheques presented by the employee and before paying the cheques, the manager of the bank's branch had telephoned a director of the plaintiff who told the manager that if the employee was presenting a cheque the signature was in order. The manager accordingly gave instructions that the cheques presented by the employee should be honoured. The plaintiff later brought an action for a declaration that the bank had improperly debited its account. The action failed on the ground that the plaintiff was estopped from claiming that the cheques had been forged. The bank had relied upon the oral representations made by the director that the signature on any cheques presented by the employee for payment was in order and the bank had acted to its detriment by paying the cheques. The duties owed to each other by a banker and his customer were considered by Crockett J in these terms:

> That mutual duties of care are owed by banker and customer is beyond question. The duty is a continuing one to act with reasonable care to ensure the proper working of the account. The duty of the bank is to know the customer's signature and to pay without delay upon the authority created by the cheque and in conformity with the mandate constituted by the directions found in the cheque. But payments may be delayed for a reasonable time to permit a reference to the drawer. The customer must use reasonable care in drawing the cheque so that the bank will not be misled. However, in ordinary circumstances, compliance with his duty does not require the customer to contemplate the possibility of either an authorization or mandate being forged. *He is thus under no duty to*

exercise reasonable care in the general course of carrying on business to prevent forgery on the part of an employee. On the other hand, the duty of the bank would require it to report to the customer any rejection by it of a cheque as being forged, so as to enable the customer to enquire into, and protect himself against, the circumstances of the supposed forgery. Should such a report be communicated so that the customer became aware that forged cheques were being presented to his banker, discharge of his duty of care would demand his informing the banker of that fact. The corrollary of this proposition is that silence in the face of a duty to speak may give rise to an estoppel. These propositions emerge from a consideration of such cases as *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559; *London Joint Stock Bank Ltd v Macmillan* supra (in so far as the opinions of the House of Lords therein expressed are not in conflict with the advice of the Privy Council in *Marshall*'s case) *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 (CA), esp per Scrutton LJ and [1933] AC 51 (HL); *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187; *Varker v The Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 and *National Bank of New Zealand Ltd v Walpole & Patterson Ltd* [1975] 2 NZLR 7.

By the doctrine of estoppel a person is precluded from denying the truth of the representation acted upon for any purpose which results in a detriment to the representee. It was contended for the plaintiffs, should Hardy's version be accepted, that upon the true construction of that version the defendant could not be shown to have acted upon such representation as was made. If it did, then that it did so to its detriment is undeniable. (Emphasis added.)

A consideration of the relevant authorities shows that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. The first duty is laid down by the decision of the House of Lords in *London Joint Stock Bank Ltd v Macmillan*[7] ('the Macmillan duty'). The second was laid down by the decision in *Greenwood v Martins Bank Ltd*[8] ('the Greenwood duty').

The Macmillan and Greenwood duties have been recognized and applied in Australia: *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd & Anor*;[9] in New Zealand: *National Bank of New Zealand Ltd v Walpole and Patterson Ltd*;[10] in India: *Abbu Chettiar v Hyderabad State Bank*[11] and in Canada: *Canadian Pacific Hotels Ltd v Bank of Montreal.*[12] The decision in *Macmillan*[7] has been applied in Malaysia: see *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd.*[3]

After a careful examination of the decisions of the superior courts of the Commonwealth, we are satisfied that there does not exist, at common law, a further duty on the part of a customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,[1] an accounts clerk of a textile company forged the signature of the company's managing

director on some 300 cheques totalling approximately HK$5.5m. The forgeries extended over a period of about 3½ years and were not discovered because of inadequate internal controls. The company brought an action for a declaration that the three banks involved were not entitled to debit its accounts for the payment of the forged cheques. The banks contended that the company was precluded from setting up the forgeries by the breach of a duty of care owing to the banks. The banks relied on what was referred to as the 'wider duty', that is, a duty to take such precautions as a reasonable customer in his position would take to prevent forged cheques being presented to his bank for payment. They also relied on what was referred to as the 'narrower duty', that is, a duty to take such steps to check his monthly bank statements as a reasonable customer in his position would take to enable him to notify the bank of any items debited therefrom which were not or may not have been authorized by him. Reliance was also placed on the customer's agreement at the time the accounts were opened to comply with the bank's rules and procedures governing the conduct of the accounts. In each case, there was a rule to the general effect that upon failure to notify the bank within a specified period of any error in the bank statements, which was sent to the customer without return of the cancelled cheques, the statement would be deemed to be approved or confirmed. We would observe that the facts of *Tai Hing*[1] were much stronger in favour of the banks there than those in the case before us.

The Privy Council held that there was no basis for the 'wider duty' or the 'narrower duty' as either an implied term of the contract between banker and customer or as a duty of care in tort, and that in the absence of any duty there could not be an estoppel. It is of interest to note that Lord Roskill who was the trial judge in *Brown v Westminster Bank*[3] was a member of the board that heard the appeal in *Tai Hing*.[1]

As we have earlier observed, Mr Joginder Singh invited us not to follow the decision of the Privy Council in *Tai Hing*.[1] Mr Sri Ram who appeared for the respondent gave three reasons as to why we ought not to do so. First, he said, the Privy Council in *Tai Hing*[1] did not lay down any new principle but merely restated principles that had been established by previous authority. His second reason is that a departure from *Tai Hing*[1] would put Malaysian common law out of line with the common law of the Commonwealth on the subject under consideration. Thirdly, he submitted that the Macmillan and Greenwood duties had already been applied in our jurisdiction and that any departure by us would be contrary to the common law of Malaysia that had already been established on the point.

We are of the view that there is merit in Mr Sri Ram's argument. In our judgment, it is important generally speaking, and more so in matters of commercial law, that there should be uniformity in the common law of the Commonwealth. We are of the view that this is good judicial policy and provides for consistency. Accordingly, we are unable to accept Mr Joginder Singh's arguments and in particular, his invitation for us to depart from *Tai Hing*.[1]

We now turn to deal with the attack on the quantum awarded by the learned judge. Mr Joginder Singh submitted that it was wrong for the

learned judge to have awarded the interest that he did on the sums that had been wrongfully debited. We have studied the evidence led on the point and we are much impressed, as must have been the learned judge, by the concession made by the appellant's witnesses that the appellant was obliged to reimburse the respondent with interest at the same rate as that imposed on the respondent's overdraft account. The learned judge, strictly speaking, was not making any special award in the nature of damages when he awarded interest and there was therefore no question of double accounting. In our view, this was merely a case of an adjustment of the accounts and when we so put it to Mr Joginder Singh, he had perforce to concede that this was so. Accordingly, we find no merit in the complaints made in respect of quantum and would therefore uphold the learned judge's decision on this.

In the circumstances, the appeal was dismissed with costs. The respondent will have the deposit in court paid out to it to account of its taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim